



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Propper Manufacturing Co., Inc.; Columbia
Diagnostics, Inc.

File: B-233321, B-233321.2

Date: January 23, 1989

DIGEST

1. A bid on a total small business set-aside, indicating that not all end items to be furnished would be manufactured or produced by small business concerns, is nonresponsive because otherwise the bidder would be free to furnish supplies from a large business and therefore defeat the purpose of the set-aside.
2. Protester whose bid is properly found nonresponsive is not an interested party entitled to protest where the protester would not be in line for award if the protest were sustained.
3. Protest against proposed withdrawal of small business set-aside is not for consideration where no solicitation has yet been issued because the General Accounting Office by law considers only protests involving solicitations and proposed or actual contract awards.
4. Protest filed more than 10 working days after basis of protest was known or should have been known is untimely.

DECISION

Propper Manufacturing Co., Inc. and Columbia Diagnostics, Inc. protest the cancellation of invitation for bids (IFB) No. DLA120-88-B-1113, a total small business set-aside, issued by the Defense Personnel Support Center, Philadelphia, Pennsylvania, for the procurement of occult blood determination test kits.

Propper's protest is denied in part and dismissed in part. Columbia's protest is also dismissed.

A total of five bids were received at bid opening on August 5, 1988. The apparent low bid of \$8.75 per unit was found to be nonresponsive. Propper's bid was next low at

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\$10.47 per unit. Columbia was next low after Proper. Relying on the pricing history of prior procurements for this item, the contracting officer sought and received approval to cancel the IFB and withdraw the set-aside because of price unreasonableness. Proper and Columbia were notified of the approved cancellation on October 17, 1988. Proper subsequently filed its protest with our Office on October 24, and Columbia filed its protest, reiterating Proper's protest grounds, on December 14.

Proper asserts that the solicitation should not have been canceled because its offered price was reasonable. Proper also protests the proposed withdrawal of the small business set-aside, and seeks the award of a contract under the original solicitation.

In its report submitted in response to this protest, the agency concludes that Proper's bid is nonresponsive due to the protester's certification in its bid that not all end items to be furnished would be manufactured or produced by a small business concern. Although Proper concedes that it mistakenly certified that not all end items to be furnished would be manufactured or produced by small business concerns, it contends that when its bid is read in whole it is apparent that only small business end items will be provided. Specifically, Proper refers to the Federal Drug Administration (FDA) file numbers it listed in its bid, denoting FDA approval of its products. The protester, a small business, asserts that these FDA files do not contain any indication that its products will be manufactured anywhere other than its own manufacturing plant. Proper explains that only the developer solution component of its product will be produced by a subcontractor, Steron, Inc.

A responsive bid is one that, if accepted by the government as submitted, will obligate the contractor to perform the exact thing called for in the solicitation. See FAR § 14.301 (FAC 84-11); J.G.B. Enterprises, Inc., B-219317.2, July 31, 1985, 85-2 CPD ¶ 109. The certification concerning a bidder's obligation to furnish products manufactured or produced by a small business concern is a matter of bid responsiveness because it involves a performance commitment by the bidder. J.G.B. Enterprises, Inc., B-219317.2, supra, at 1-2. Where a bid on a total small business set-aside fails to establish the bidder's legal obligation to furnish end items manufactured or produced by a small business concern, the bid is nonresponsive and must be rejected; otherwise, a small business contractor would be free to

provide the end items from either small or large businesses as its own business interests might dictate, thus defeating the purpose of the set-aside program. See Rocco Industries, Inc., B-227636, July 24, 1987, 87-2 CPD ¶ 87.

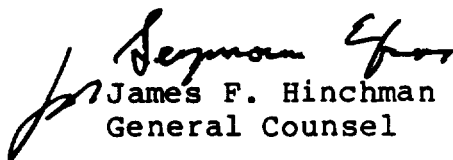
Regardless of Proper's contention that this certification was the result of a clerical error, because acceptance of Proper's bid would not legally obligate the company to furnish small business products, we agree that the bid must be rejected as nonresponsive. See Delta Concepts, Inc., B-230632, July 13, 1988, 67 Comp. Gen. _____, 88-2 CPD ¶ 43. With respect to Proper's post-bid explanation of what it actually intended, responsiveness is determined from the face of the bid itself; to allow a bidder to make its nonresponsive bid responsive after opening would be tantamount to permitting it to submit a new bid, and thus may not be permitted. Id.; See Jack Young Associates, Ltd., B-195531, Sept. 20, 1979, 79-2 CPD ¶ 207. Even if Proper's bid could be read as Proper suggests and we were to accept the contents of the referenced FDA filings as part of its bid, Proper's bid is, at best, ambiguous since it contains a specific certification that Proper will not be supplying small business products and an apparent contradictory statement incorporated by reference that its place of performance is a small business. See generally Discount Machinery & Equipment, Inc.--Request for Reconsideration, B-223048.2, July 1, 1986, 86-2 CPD ¶ 5. Therefore, we deny Proper's challenge to the agency's nonresponsiveness determination.

Given the nonresponsiveness of Proper's bid, we need not consider the propriety of the contracting officer's decision to cancel the solicitation since we conclude that Proper is not an "interested party" under our Bid Protest Regulations, 4 C.F.R. §§ 21.0(a) and 21.1(a) (1988). Where, as here, a protester would not be in line for an award even if its protest were resolved in its favor, the firm is not an interested party and we will not consider the protest on the merits. See National Medical Homecare, B-229577, Jan. 12, 1988, 88-1 CPD ¶ 21. Under the circumstances, Proper is not an interested party to protest the cancellation of the solicitation because, as a nonresponsive bidder, it would not have been eligible for award if the solicitation had not been canceled. See Beckman Instruments, Inc., B-220794; B-220795, Feb. 20, 1986, 86-1 CPD ¶ 178 at 5. Accordingly, we dismiss Proper's protest of the cancellation of the solicitation.

As to Proper's protest against the proposed withdrawal of the small business set-aside, we understand from the agency, and the protester does not dispute, that no new solicitation has been issued. Under our Bid Protest Regulations, we consider protests involving solicitations issued by federal agencies and awards made or proposed to be made under these solicitations. 4 C.F.R. § 21.1(a). Although the agency may have decided to procure the test kits on an unrestricted basis in the future, until such time as the agency initiates a procurement through the issuance of a solicitation there is no basis for us to consider this aspect of Proper's protest. See Centronics Sales & Service Corp., B-225514, Dec. 3, 1986, 86-2 CPD ¶ 640. We therefore dismiss this protest issue.

Proper's protest is denied in part and dismissed in part. In view of our resolution of the protest, Proper's claim for costs is denied. See Hydrosience, Inc., B-227989 et al., Nov. 23, 1987, 87-2 CPD ¶ 501.

We note that during the pendency of Proper's protest, Columbia also filed a protest against the cancellation of the IFB. Columbia seeks award of a contract under the original solicitation as the only responsive bidder. Our regulations provide that, in cases other than alleged improprieties in a solicitation which are apparent prior to bid opening, protests must be filed not later than 10 working days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a). The record reflects that notice of the cancellation of the solicitation was sent to all bidders on October 17, 1988. Columbia filed its protest with our Office on December 14, more than 10 working days after it should have known the basis of its protest. Therefore, we dismiss Columbia's protest as untimely filed.


James F. Hinchman
General Counsel